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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-404

LEWIS COLTEN,

Appellant,

—v.—

COMMONWEALTH OF KENTUCKY,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE APPELLANT

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Opinion Below

The opinion of the Kentucky Court of Appeals (Juris. State., pp. 1a-11a) is reported at 467 S.W.2d 374. The opinion of the Fayette Circuit Court (Juris. State., pp. 12a-15a) is not officially reported.

Jurisdiction

The Kentucky Court of Appeals issued its judgment on May 21, 1971 and its order and mandate was entered on June 22, 1971. The Jurisdictional Statement was filed on September 20, 1971, and probable jurisdiction was noted on January 10, 1972. The jurisdiction of the Court rests on 28 U.S.C. §1257(2).

Constitutional and Statutory Provisions Involved

A) Constitution of the United States, Amendments I and XIV, §1.

B) KRS §437.016 found in 1968 Cumulative Supplement to the Kentucky Revised Statutes at p. 1272:

437.016 *"Disorderly conduct" defined; penalty*

(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or

(b) Makes unreasonable noise; or

(c) In a public place uses abusive or obscene language, or makes an obscene gesture; or

(d) Without lawful authority, disturbs any lawful assembly or meeting of persons; or

(e) Obstructs vehicular or pedestrian traffic; or

(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

(g) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) Disorderly conduct is punishable by imprisonment in jail for not more than six months, by a fine of not more than $500, or both.

C) Rules 12.02 and 12.06 of the Kentucky Rules of Criminal Procedure found in 1968 Cumulative Supplement to the Kentucky Revised Statutes at pp. 1430-1431:

12.02 *Manner of Taking*

(1) An appeal to the circuit court is taken by filing with the clerk thereof a certified copy of the judgment and the amount of costs, and causing to be executed before the clerk a bond to the effect that the defendant will pay the costs of the appeal and perform the judgment which may be rendered against him on the appeal; whereupon, the clerk shall issue an order to the judge or the justice rendering the judgment, to stay proceedings thereon, and to transmit to the office of said clerk all the original papers in the prosecution.

(2) The applicable provisions governing bail shall apply to the bond provided for in subsection (1).

(3) After the service of the order to stay proceedings, no execution shall be issued from the inferior court, and any officer on whom the order is served shall return the execution in his hands as suspended by appeal.

12.06 *Schedule and Manner of Trial; Judgment*

Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court, and thereupon he shall be adjudged to pay the costs of the appeal. If an appeal taken to the circuit court be dismissed, the judgment of the court from which it was taken shall stand affirmed and the costs of the appeal shall be paid by the party whose appeal is dismissed.

Questions Presented for Review

I. Whether the Kentucky Disorderly Conduct Statute, KRS 437.016 has been rendered unconstitutionally broad and vague by the Kentucky Court of Appeal's holding that where, in the opinion of the Kentucky courts, non-obscene, non-defamatory assembly or expression does not possess minimum social value, such assembly or expression can be treated as unlawful if it causes mere inconvenience or annoyance to police officers?

II. Whether the Kentucky Disorderly Conduct Statute has been rendered unconstitutionally broad and vague by application of the statute to convict a person on the grounds that (a) he failed to leave when ordered by the police to do so at the scene of the issuance of a motor vehicle citation to another person where the person charged with disorderly conduct either stated that he wished to observe what was happening or stated that he wished to aid affected persons to secure transportation home; or (b) on the grounds that his presence was judicially characterized as having caused others to congregate in a roadway?

III. Where, under a state's rules of criminal procedure a conviction in a lower criminal court can be appealed only by trial *de novo* in the court of general jurisdiction, and where upon conviction at such an appeal by trial *de novo* and without setting forth any special grounds of justification, the court of general jurisdiction fixes the penalty five times greater than that set by the lower criminal court, has the right to appeal been unconstitutionally chilled and fettered and has the defendant been unconstitutionally twice placed in jeopardy, all in violation of the due process clause of the Fourteenth Amendment?

Statement of the Case

A. *The Events.*

On March 3, 1970, Mrs. Richard M. Nixon toured Lexington, Kentucky. Appellant, Lewis Colten, went to the Bluegrass Airport, which serves Lexington, to conduct a "counter-demonstration" at the time of Mrs. Nixon's departure (App., pp. 54, 58). Appellant stated that the group with which he was associated (a coalition of the Young Democrats, Students for a Democratic Society, Student Mobilization Committee, and individuals) intended overtly to ignore Mrs. Nixon and to conduct a show of support for a gubernatorial candidate, Sam Mason (App., pp. 52, 54).

Mr. Colten is a young person with a long moustache and long hair who dresses in a manner which the Fayette Circuit Court described as "differently than what the great majority of society would believe in . . ." (App., p. 109). While in the terminal area, at about the time Mrs. Nixon's plane was preparing to take off, Mr. Colten was observed by the purported arresting officer, Trooper Harlowe. Trooper Harlowe's testimony of this first encounter with Colten was as follows: "[A]s the airplane was getting ready to leave they [including Colten] came up to me where I was stationed at, at the airport, and said, 'We're going to have a party.' I said, 'Not out here,' so they then proceeded to get over on the lawn of the airport and throw themselves a little whooping and hollering party over there or whatever they call it, creating a scene" (App., p. 40). Trooper Harlowe's testimony made it clear that he was offended by Colten's style of dress and presence at the airport "with an awfully lot of important people traveling in and out . . ."

(App., p. 41). Although he declined to make a specific finding either way, the Fayette Circuit judge noted that: "It may be that the police officers were hostile toward this defendant because of his appearance . . ." (App., p. 110). No arrest was made at this time.

After Mrs. Nixon's plane departed, people at the airport terminal left via the access road (App., pp. 4, 6). Colten was driving a car with two passengers and had room for three or four more (App., pp. 43-44, 84). He was directly behind a vehicle operated by Guy Mendez. The Mendez car carried a total of five persons (App., p. 80).

At the direction of State Police Officer John R. Miller, the Mendez car pulled over onto the shoulder of the outbound traffic lane, off the access road. Officer Miller pulled off the road directly behind the Mendez car, and on seeing this, Colten, who knew Mendez, pulled off of the road and behind Officer Miller's vehicle (App., pp. 6, 45). Officer Miller found that Mendez had an expired Louisiana license plate and had pulled Mendez over for the purpose of issuing a citation (App., p. 5). Officer Miller informed the occupants of Mendez's car that it would have to be towed away (App., pp. 47, 79).

Colten approached Officer Miller and Mr. Mendez inquiring as to what was happening. There is disputed testimony as to whom he addressed his inquiry, whether to Mendez or to Officer Miller (App., pp. 6-7, 46-47, 82-83). According to Colten, he had received a six-week extension on securing new Pennsylvania plates for his car and he sought to question Mendez as to whether he had possibly received a similar extension (App., p. 47). Miller testified that Colten spoke to him (App., pp. 6-7). Although the

trial court did not resolve this factual dispute, the Kentucky Court of Appeals found that Colten addressed himself to Trooper Miller, and that "Colten continued to endeavor to engage Miller in conversation, and to offer advice to Mendez, until Miller got into his patrol car with Mendez and rolled up the windows to shut out Colten's interference" (467 S.W.2d at 376). Trooper Miller's testimony that he rolled up his window was contradicted by the testimony of his superior officer (App., p. 19). There is, however, no dispute but that Officer Miller completed the issuance of the citation from inside his patrol car without assistance and he made no requests for anyone to arrest Colten, nor did he attempt to do so himself (App., pp. 7, 12, 16, 82-83).

Additional State Police and County Police Officers arrived, their number being variously estimated as 5 to 10 (App., pp. 20, 70, 87, 93). Additional non-police cars pulled onto the shoulder. Thereafter the number of people in the vicinity of Mendez's car was variously estimated as 4 to 18. Most of the testimony, including Officer Miller's, made it clear that they were standing in several different separated groups (App., pp. 8, 56, 59, 81, 92-93).

Captain Mayes of the State Police told the people standing around to get into their cars and leave. He testified that he did not specifically see Mr. Colten at this time or specifically ask him to leave (App., pp. 16-17). State Police Officer T. H. Brown testified that when he arrived he twice said to Mr. Colten: "Now, this is none of your affair, what's going on here, get back in your car and please move on and clear the road" (App., p. 23). Trooper Brown also testified that Colten said he wanted to see if anyone in Mendez's car needed a ride (App., p. 30).

The prosecutor attempted to establish that Colten had stood in the road and caused an obstruction to traffic in violation of subsection (e) of KRS 437.016. However, the evidence against Colten was at best unclear. It generally showed that there was little traffic. Although some people may have been in the road for a short time, traffic blockage, if there was any, was caused by the later arriving police vehicles which parked in the road even though they could have pulled onto the grass on the other side of the access road (App., pp. 13, 16, 20-21, 24-25, 34, 35-36, 59, 70-71, 78, 81-82, 90). Moreover, the trial court rejected the obstruction-to-traffic theory as the basis for finding Colten guilty (Juris. State. 14a—bottom of page). Nevertheless, the Kentucky Court of Appeals said that Colten's continued presence "encouraged and led the *others* to stay, blocking a traffic lane . . ." (467 S.W.2d at 376). (Emphasis supplied.)

Officer Harlowe, the purported arresting officer, testified that he first saw Colten at the edge of the road (App., p. 34), that he asked Colten to leave (App., pp. 36-37), and that, when asked to leave, Colten said that he was going to stay around and see what happened (App., pp. 35, 37). Colten denied making this response (App., p. 50). Almost all of the evidence described Colten as speaking quietly to Officer Harlowe (App., pp. 49-50, 65, 85). Yet, as the defense witnesses testified, Officer Harlowe said to Colten: "Okay, loudmouth, get back in the car," or words to that effect (App., pp. 49, 64, 71). Colten's response was that he would, but that he first wanted to help the people needing rides (App., pp. 48-49, 63-64, 71). On cross-examination, Officer Harlowe admitted that he may have addressed Colten as "loudmouth" and that he may have said to him

"You've caused enough trouble today" (App., pp. 37-39). Officer Harlowe, referring to his previously noted personal impressions concerning Colten's appearance, stated that he felt that Colten had "caused enough trouble" (App., pp. 38-41). Officer Harlowe also admitted that Colten "might have" asked whether he could give a ride to some of the people in the Mendez vehicle (App., p. 42). And in his decision, the Circuit Court judge noted: "I appreciate the fact that he [Colten] may have been wanting to help . . ." (App., p. 111).

Although there is clear evidence that Officer Harlowe took Colten into physical custody, there is also evidence that he never told Colten that he was under arrest and that, in fact, after grabbing Colten he again asked Colten whether he would leave (App., pp. 49-50, 64-65, 73-74). The evidence is clear that, from the time Harlowe ordered Colten to leave through the time he took Colten into physical custody, Colten was constantly standing well off the road on a grassy shoulder area (App., pp. 36, 62, 70, 80). Upon grabbing Colten, Trooper Harlowe was joined by other police officers. The evidence showed that Mr. Colten was then punched, his hair and moustache pulled by these other officers, and that he was tossed into a police van (App., pp. 49-50, 64, 67, 72-73, 81-82, 85-86, 89). One police officer testified that he heard what was possibly a scream of pain from Colten (App., p. 33). And, the Circuit Court in its decision stated: "I think that the police officers may have also been a little rougher in this instance than may have been necessary. I don't know, I don't find that they did or did not" (App., p. 110).

B. *The Proceedings.*

On March 6th, 1970, Colten was tried without jury in Fayette County Quarterly Court, a court of limited criminal jurisdiction, and convicted under KRS 437.016. He was fined $10 plus costs. The closing argument of the defense asserted that the application of the statute to this case was prohibited by the due process and equal protection clauses of the Constitution of the United States. There is no record of these proceedings.

Colten appealed his conviction pursuant to Rule 12.02 of the Kentucky Rules of Criminal Procedure which permits an appeal by trial *de novo* in the court of general original jurisdiction, the Circuit Court. Prior to the resulting trial *de novo* in Fayette Circuit Court, Criminal Division, Appellant again raised his constitutional challenges to KRS 437.016 by a pre-trial motion to dismiss on the grounds that KRS 437.016 is overly vague and void for overbreadth under the Fourteenth Amendment. The court denied this motion at the opening of trial.

By consent, the trial *de novo* was without a jury. The Circuit Court found Appellant guilty under subsection (f) of KRS 437.016 (refusing to comply with a lawful order of the police to disperse) and fined him $50 and costs. The court offered no explanation for the increased penalty. Appellant's challenges to the constitutionality of KRS 437.016 under the Fourteenth Amendment were renewed on a motion for a directed verdict at the close of the prosecutor's case. They were again renewed in closing argument and once more upon a motion for a new trial. In addition, Appellant challenged, at these times, the application of the statute to the facts of the case on the grounds that such application would violate the Equal Protection

clause of the Fourteenth Amendment, and would give KRS 437.016 an interpretation which would do further violence to the due process clause of the Fourteenth Amendment. After judgment was rendered, Appellant moved the trial court to correct the penalty imposed so as not to exceed that imposed by the court below. This motion was based on the due process clause of the Fourteenth Amendment. The Circuit Court rejected all of Appellant's constitutional objections.

Colten appealed to the Court of Appeals of Kentucky asserting the unconstitutionality of the Disorderly Conduct statute both on its face and as applied. Colten also challenged the constitutionality of the Circuit Court's imposition of a greater penalty on the *de novo* retrial than that which had been imposed below.

C. *Decision of the Kentucky Court.*

The Kentucky Court of Appeals construed the Disorderly Conduct statute as applying whenever the predominant intent of one who has committed any of the proscribed forms of conduct is to cause public inconvenience, annoyance or alarm. That predominant intent, held the Kentucky court, can be inferred from the lack of bona fide intent to exercise a constitutional right or from the finding that the interest advanced by the exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise. Applying that test to the instant case, the Kentucky court ruled that "[t]he evidence warranted the inference . . . that Colten's real intent was simply to aggravate, harass, annoy and inconvenience the police, for no purpose other than the pleasure of aggravation, harassment, annoyance

and inconvenience." 467 S.W.2d at 376. It upheld Colten's conviction, rejecting the challenge that the Disorderly Conduct statute is unconstitutional on its face and as applied to Colten.

Also rejected by the Kentucky Court of Appeals was Colten's challenge to the constitutionality of imposing, upon the trial *de novo* on appeal from an inferior criminal court, a greater penalty than that imposed below. The Kentucky court noted that one can plead guilty in Quarterly Court and still receive a trial *de novo* appeal in Circuit Court. It explained that its reading of *North Carolina* v. *Pearce,* 395 U.S. 711, permits the state to put a "price on the accused's privilege of a choice of courts as distinguished from pricing the right to obtain a fair trial in one court which the state fixes as the sole forum." 467 S.W.2d at 379.

Summary of Argument

I. The Kentucky high court has construed its Disorderly Conduct statute as a prohibition upon assembly and expression where the accused has no bona fide intent to exercise a constitutional right or where the constitutional right exercised is of insufficient interest to justify the inconvenience and annoyance caused by that exercise. In so construing the statute, the Kentucky court has permitted constitutional values to be overbalanced by mere relief from inconvenience and annoyance. This test was rejected in *Edwards* v. *South Carolina,* 372 U.S. 229, and elsewhere. In justifying its result, the Kentucky court has misconstrued the rationale of *Roth* v. *United States,* 354 U.S. 476, and its progeny by applying the redeeming social value approach to non-erotic expression.

The restraints on expression, assembly and the like encompassed in Kentucky's Disorderly Conduct statute are so vague as to provide no meaningful guidance to the person seeking to live within the law. As a result, law enforcement officials are given unbridled discretion in applying the law. Accordingly, KRS 437.016 suffers the defects condemned in *Coates* v. *City of Cincinnati,* 402 U.S. 611, and like cases. Moreover, the Kentucky decision compounds the error of vagueness by placing on the accused the burden of proving the legitimacy of his expression or assembly.

A further defect of the Disorderly Conduct statute is its sweeping reach into the realm of constitutionally protected rights. Clearly protected exercises of assembly and expression, such as peaceful picketing, can be restrained under this statute. In addition, by permitting the speaker's or assembler's intent, rather than action, to be determinative, the Kentucky decision encroaches upon freedom of thought and conscience.

II. In applying its statute, Colten's conduct was judged not by constitutional standards but by the court's own notions of preferred modes of behavior. *Cohen* v. *California,* 403 U.S. 15. Because he was peacefully assembling in a public place, creating no risk of harm, and violating no lawful restrictions upon the use of that public property, Colten had a constitutionally protected right to be, and remain, where he was. Accordingly, his arrest cannot be justified on his failure to respond to police orders to "move on." *Shuttlesworth* v. *Birmingham,* 394 U.S. 147; *Wright* v. *Georgia,* 373 U.S. 284. His conduct was similarly protected because he was seeking to convey information to a friend and because he was observing an event of public interest—the issuance of a citation. Moreover, the record

reveals that Colten's arrest was not generated by his conduct, rather it was the product of police antipathy toward persons of his life style which, combined with duty fatigue, resulted in an assault upon him. Because of its vagueness, the Disorderly Conduct statute was a mask for this abuse of police authority, thus providing a concrete illustration of the evil inherent in such vague and overly broad laws.

III. The Kentucky court additionally erred by refusing to apply the rule of *North Carolina* v. *Pearce,* 395 U.S. 711, to trial *de novo* appeals. There is no meaningful difference between retrial on remand for error and retrials on trial *de novo* appeal. In the first instance the error has been specifically found; in the second instance it has been irrebuttably presumed as a matter of law. In either case, the prospect of an increased penalty upon retrial creates an apprehension of vindictiveness and places a price upon the statutory right of appeal. As stated in *Pearce,* due process prohibits a procedure which places an Appellant in such fear or which imposes such a price upon the granted right of appeal. Moreover, the opinion of the Kentucky court implies approval of assessing heavier penalties upon retrial as an appropriate price for having appealed. Such a policy is forbidden by considerations of due process. Further, in Kentucky the *de novo* appeal provides the sole constitutional trial. Hence, placing a price on the appeal for a *de novo* trial amounts to placing a price upon the right to receive a fair trial.

Increasing the penalty upon a trial *de novo* appeal also violates the protection from double jeopardy inasmuch as the defendant is twice forced to run the gantlet of defending himself in order to receive but a single constitutional trial.

ARGUMENT

I.

The Kentucky Disorderly Conduct statute, KRS 437.016, has been rendered unconstitutionally broad and vague by the Kentucky court's holding that where, in the opinion of the Kentucky courts, non-obscene, non-defamatory assembly or expression does not possess minimum social value, such assembly or expression can be treated as unlawful if it causes mere inconvenience or annoyance to police officers.

A. *The Kentucky Court's Construction of the Statute.*

The Kentucky court's construction of the Disorderly Conduct statute sustains convictions for engaging in proscribed conduct with a "predominant" intent to cause public inconvenience, annoyance or alarm, or for recklessly creating a risk thereof. 467 S.W.2d at 377. A finding of the requisite predominant intent can result either because the defendant had "no bona fide intent to exercise a constitutional right" or because "the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise." *Ibid.*

As the Kentucky court explained: "We think it is a matter of balancing interests and that where the interest which the individual seeks to advance through exercise of freedom of speech is minuscule in comparison with the public's interest in being protected from the consequences of that exercise, the public's interest should prevail even though the harm the public might be exposed to is no more than

inconvenience or annoyance." *Ibid.* The Kentucky court found guidance in the *"Fanny Hill"* case, 383 U.S. 413, saying: "If the lack of redeeming social value is a basis upon which the right of freedom of speech may be required to yield to the protection of contemporary standards of morality . . . , it would seem that the public's interest in being protected from inconvenience, annoyance or alarm should prevail over any claimed right to utter speech that has no social value." *Ibid.*

On its face, subsection (f) of the Kentucky statute, the provision under which Colten was convicted, appears to condition guilt on two questions: a) Was there a lawful basis for ordering a public assembly to disperse; and b) Was there an intent, actual or constructive, to cause public inconvenience, annoyance or alarm? The Kentucky court's interpretive gloss substitutes, instead, a single balancing test: Was the assembly of less significant value than the public interest in being free from any resulting inconvenience, annoyance or alarm? In casting this balance, the value of that assembly will be disregarded by the Kentucky court if the defendant lacked a "bona fide" intent to exercise his constitutional right. And included in the "public interest" scale of the balance is any annoyance or inconvenience to the police. This interpretation of the Kentucky Disorderly Conduct statute misconstrues the guiding constitutional doctrines and renders the Kentucky Act constitutionally void for over-breadth and vagueness.

B. *The Kentucky Court Has Misconstrued the Redeeming Social Value Test by Applying It to a Non-obscenity, Non-defamation Statute.*

It is not without irony that the Kentucky court made the various controlling criteria of the *Roth* and *"Fanny Hill"* tests generally applicable to freedom of expression, assembly, and association, inasmuch as the Kentucky court has consistently rejected the doctrines of those cases when dealing with obscenity. *Cain* v. *Commonwealth,* 437 S.W.2d 769 (Ky. 1969), *rev'd per curiam* 397 U.S. 319; *Hayes* v. *Commonwealth,* 470 S.W.2d 601 (Ky. 1971). By importing the obscenity tests to the instant statute, the Kentucky court has departed from the prevailing constitutional standard for non-obscene, non-defamation speech, i.e., the test of clear and imminent danger of a real and substantial evil. *Coates* v. *City of Cincinnati,* 402 U.S. 611; *Brandenburg* v. *Ohio,* 395 U.S. 444; *Edwards* v. *South Carolina,* 372 U.S. 229.

In *Cohen* v. *California,* 403 U.S. 15, Mr. Justice Harlan, speaking for the Court, rejected the application of the obscenity standards of *Roth* to situations which do not in some significant way involve erotic expression. 403 U.S. at 20. And that rejection is wholly consistent with the underlying rationale of *Roth.*

In *Roth,* examining the history of guarantees of speech and press, the Court concluded that the Framers of the Amendment did not intend obscenity to be within the scope of constitutionally protected expression. *Roth* v. *United States,* 354 U.S. 476, 481-83. But sex and obscenity are not synonymous. *Roth, supra,* 354 U.S. at 487. Hence, the criteria of predominant interest, prevailing community standards and redeeming social value, debated and described in

Roth and subsequent decisions, focus on the means for determining whether expression involving sex is obscene and is, therefore, unprotected expression, as contrasted with expression not properly characterized as obscene and, therefore, not subject to regulation absent satisfaction of the normal constitutional safeguard provided by the clear and imminent danger test. The Kentucky court did not show, nor could it show, that the type of assembly, expression or association involved here was historically or otherwise relegated to the unprotected level of assembly, expression or association; reserved for "obscenity" and some forms of defamation, e.g., *New York Times Co.* v. *Sullivan*, 376 U.S. 254. It is obvious, therefore, that the obscenity doctrine is wholly inappropriate for non-obscenity situations, like the one involved in this case.[1] This Court has so held. *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 182.

The deficiency of the Kentucky court's reasoning flows at least in part from its failure to recognize that the freedoms of assembly, association and expression are constitutionally fixed at the highest level of social value. Only other constitutionally fixed values and the value of being free from imminent danger of substantial harm can be balanced against the constitutionally fixed values of expression, association and assembly. No other values can constitutionally be weighed against First Amendment type freedoms. As Mr. Justice Douglas stated, speaking for the Court in *Terminiello* v. *Chicago*, 337 U.S. 1, 4:

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[1] It is by no means clear that the *Roth* criteria are fully applicable any longer, or that the proper inquiry concerns the question of whether there is a class of so-called "obscene" speech which is unprotected without regard to inquiry as to its effects. See, e.g., *Redrup* v. *New York*, 386 U.S. 767.

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. . . . There is no room under our Constitution for a more restrictive view.

This constitutional doctrine was reiterated by the Court, speaking through Mr. Justice Stewart, in *Edwards* v. *South Carolina,* 372 U.S. 229, 237-38. Thus, the Kentucky court has erred in permitting constitutionally fixed values to be overbalanced by the mere value of relief from inconvenience, annoyance, harassment and the like.

C. *The Overly Vague Gloss Placed on the Disorderly Conduct Statute Gives Unbridled and Therefore Unconstitutional Discretion to the Police.*

A statute is unconstitutionally vague if it holds a person criminally responsible for conduct which he could not reasonably understand to be proscribed. *United States* v. *Harriss,* 347 U.S. 612, 617; *Bouie* v. *Columbia,* 378 U.S. 347, 351; *Wright* v. *Georgia,* 373 U.S. 284, 293; *Palmer* v. *City of Euclid, Ohio,* 402 U.S. 544, 546. The due process protection against overly vague statutes serves, as well, to protect against unbridled discretion being placed in the hands of the police, prosecutors, juries or courts in estab-

lishing what conduct is to be subject to criminal penalties. *Herndon* v. *Lowry*, 301 U.S. 242, 263; *Scott* v. *District Attorney*, 309 F. Supp. 833, 836 (E.D. La. 1970); *Severson* v. *Duff*, 322 F. Supp. 4, 6 (M.D. Fla. 1970). The constitutional standard for over-vagueness is, of course, that a statute or charge must be phrased in terms sufficiently definite so that men of common intelligence will not have to guess at its meaning and application. *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *Connally* v. *General Construction Co.*, 269 U.S. 385, 393. And, the demands of statutory precision are especially great in statutes, such as this, which reach freedom of expression. (See authorities cited in Mr. Justice Harlan's concurrence in *Garner* v. *Louisiana*, 368 U.S. 157, 206.)

The interpretive gloss placed upon the Kentucky Disorderly Conduct statute does not remove the blatant vagueness of the standards of conduct established by that statute. For example, subsection (a) of the Act prohibits the engaging in "tumultuous" behavior. Webster's Third New International Dictionary includes in its definition of "tumultuous" the following: "Full of commotion and uproar." This would normally define almost any group gathered to watch a sporting event. It would also describe the conduct of a large group of purchasers attending a bargain sale. If such conduct causes inconvenience or annoyance to some members of the public, does the Act make that conduct subject to punishment under the Disorderly Conduct statute?

Subsection (b) prohibits the making of "unreasonable" noise. A loud sneeze at a dramatic performance may be "unreasonable" and certainly is publicly annoying. Speaking in a loud voice in a park area where infants are asleep in carriages may be an "unreasonable" noise. Is conduct of this sort made criminal by the Disorderly Conduct statute?

Subsection (c) prohibits the use of "abusive" language. Does this encompass only "fighting words?" *Chaplinsky* v. *New Hampshire,* 315 U.S. 568. Does it encompass the use of abusive language amongst persons who, because of custom or circumstance, do not take offense at the language?[2] Does it encompass the use of abusive language under circumstances in which the use of such language reduces rather than promotes the prospect of abusive behavior?[3] A similarly worded provision was struck down as overly vague in *Wilson* v. *Goodi[illegible]*, 303 F. Supp. 952 (N.D. Ga. 1969), *app. dismissed,* 396 U.S. 112, *aff'd,* 431 F.2d 855 (5th Cir. 1970).

Subsection (d) makes conduct unlawful if one "disturbs any lawful assembly or meeting of persons." To pose an unpopular question to a popular speaker may well be "disturbing." To make a critical or seemingly absurd comment may be "disturbing." To boo or hiss a popular speaker or one who holds a position of high stature may be "disturbing." Is this sort of conduct prohibited by the Disorderly Conduct statute?

Subsection (g) of the Act prohibits the creating of "physically offensive" conditions by any act that serves no

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[2] A. Montagu, Anatomy of Swearing (1967) (*passim*); see, e.g., R. L. Keiser, The Vice Lords at 46 (1969).

Empirical research has shown that listeners take less offense at the use of "abusive" or "profane" words if they perceive that the speaker has justification for resorting to strong language. C. Rossiter, Jr. & R. Bostrom, *Personal Usage and Offensiveness of Taboo Words,* Paper delivered at Int'l Communication Ass'n Meeting, Cleveland, Ohio, Apr. 1970.

[3] Verbalizing hostility has been found, under many circumstances, to reduce the incidence of hostile behavior both of the verbalizers and of their sympathizers. Rosenbaum & DeCharms, *Direct and Vicarious Reduction of Hostility,* 60 J. of Abnormal Psych. 105 (1960).

legitimate purpose. If one dresses in tattered garb or clashing colors, has a physically offensive condition been created by an act which may serve no legitimate purpose? If one walks in public with an exposed wound, has a physically offensive condition been created by an act which serves no legitimate purpose? Is this sort of conduct condemned by the Disorderly Conduct statute?

From the Kentucky court's construction of the statute, it appears that in all of the foregoing situations the accused may be found guilty if he lacked a good faith intent to exercise constitutional rights or if his rights are found to be overbalanced by any resulting inconvenience or annoyance. From the results in the instant case, it would appear that if a policeman is annoyed at an accused's conduct, he can make an arrest in good faith. The only practical guidance for one who wishes to avoid such an arrest in Kentucky is that if his appearance or views are unpopular with the police, he can anticipate arrest. And, if they are equally unpopular with the court or jury, he can anticipate conviction. The statute, as construed, provides no legitimate guidelines either for the person whose conduct is being regulated nor for law enforcement officials.

Coates v. *City of Cincinnati*, 402 U.S. 611, is authority for striking down this statute. In the *Coates* case three justices argued that there was a potential for the state judiciary to narrow the city's annoying assembly ordinance through interpretation and thereby avoid constitutional defects. In the instant case we have already had the benefit of the state court's interpretive explication. And, as so interpreted, the vagueness of the Kentucky Disorderly Conduct statute causes it to fall of its own weight.

> The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. *Coates* v. *City of Cincinnati, supra,* 402 U.S. at 615. *Accord, Papachriston* v. *Jacksonville,* No. 70-5030; *Smith* v. *Florida,* No. 70-5055 (decided by this Court on Feb. 24, 1972, and voiding on vagueness grounds Florida's vagrancy law). See also, *Owens* v. *Commonwealth,* 211 Va. 633, 179 S.E.2d 477 (Va. 1971) (holding state unlawful assembly law unconstitutional for using standard less rigorous than clear and present danger).

Moreover, a statute is unconstitutionally vague where, as in the Kentucky court's interpretation of this statute, it places on the accused the burden of establishing the legitimacy of his assembly or speech. The burden of demonstrating that conduct is illegitimate belongs to the state. See, e.g., *Wright* v. *Georgia,* 373 U.S. 284, 292-93; *Thomas* v. *Collins,* 323 U.S. 516, 530. See also, *New York Times Co.* v. *Sullivan,* 376 U.S. 254. Cf. *Speiser* v. *Randall,* 357 U.S. 513. For this reason, too, the Kentucky statute is unconstitutional.

The Kentucky Court's error is especially evident when one considers that under its approach the critical issue of bona fide intent can be made a matter of inference, as it was here. Thus, conduct which constitutionally is to be unfettered, will be subject to penalty if the court or jury is displeased by the defendant's frame of mind. Moreover, the unconstitutional vagueness of the Kentucky law becomes even more apparent when one considers that the

Kentucky court will find that an accused lacked the "legitimate objective" required by its decision if, as more fully explored in Point II below, alternative means for assembly and expression could have been utilized. 467 S.W.2d at 376. Thus, the person regulated must explore and weigh all alternatives of conduct in order to find guidance respecting the lawfulness or unlawfulness of his conduct under this statute.

The most serious danger emanating from the Kentucky court's vague construction of the Disorderly Conduct statute results from the fact that it leaves too much to the policeman's discretion. Such a law, as noted by this Court in *Coates* v. *City of Cincinnati,* 402 U.S. 611, 616, "contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their life style or their physical appearance is resented by the majority of their fellow citizens." See also, *Wheeler* v. *Goodman,* 306 F. Supp. 58, 62 (W.D. N.C. 1969) (3 judge court), appeal pending No. 70-26 argued Dec. 8, 1971, 40 U.S.L.W. 3277.

This vice of vagueness in the Kentucky statute is similar to the one discussed in *Shuttlesworth* v. *Birmingham,* 382 U.S. 87. Because it is disorderly conduct for a group to cause any sense of annoyance if it is assembled "with no legitimate purpose," the Kentucky statute could be applied, like *Shuttlesworth,* to a group of civil rights leaders chatting together on a downtown sidewalk. Restraint of conduct in such situations is thus left to the "whim of any police officer . . ." 382 U.S. at 90. As Mr. Justice Stewart, speaking for the Court in *Shuttlesworth,* stated: "Instinct with its ever-present potential for arbitrarily suppressing

First Amendment liberties, that kind of law bears the hallmark of a police state." 382 U.S. at 90-91.

Such abuse is far from an imagined danger to our society. Research shows that ghetto dwellers list as a prominent source of antagonism to the police their experience with arbitrary enforcement of vaguely-worded disorderly conduct, vagrancy, loitering, breach of the peace, and similar statutes. E.g., *Report of the National Advisory Commission on Civil Disorders* at 303-05 (Bantam ed. 1968); D. Bordua & L. Tifft, *Citizen Interviews, Organizational Feedback, and Police-Community Relations Decisions*, 6 Law & Society Rev. 155, 163-64 (1971). Authoritative sources state that there is frequent police misuse of statutes giving broad discretion to law enforcement authorities. *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* at 187-88; D. Bordua & L. Tifft, *Citizen Interviews, Organizational Feedback, and Police-Community Relations Decisions*, 6 Law & Society Rev. 155, 159 (1971). Moreover, these very abuses themselves generate much of the difficulty encountered in conducting effective law enforcement operations.[4]

That these police abuses of authority and excessive discretion exist and are a serious affront to constitutionally guaranteed liberty was acknowledged by this Court in *Terry* v. *Ohio*, 392 U.S. 1, 15. And, in that same decision, this Court reaffirmed that the judiciary continues to have

[4] Ghetto perceptions of police conduct appear to be highly related to expressed unwillingness to cooperate with police officers. H. Hahn, *Ghetto Assessments of Police Protection and Authority*, 6 Law & Society Rev. 183, 191 (1971). Police harassment generates a hostility which lessens overall law enforcement effectiveness. Tiffany, McIntyre & Rotenberg, *Detection of Crime* at 187 (1967).

a responsibility "to guard against police conduct which is overbearing or harassing . . ." *Ibid.* Rejection of overly vague statutes such as this Kentucky statute, which provide law enforcement officers with seeming authority for engaging in overbearing police conduct, is a prime way in which the judiciary can meet the responsibility reaffirmed in *Terry.*

D. *The Statute as Construed Is Constitutionally Void for Overbreadth.*

It is a well settled law that a statute is constitutionally void if its sweep "operates as a disincentive"[5] to the exercise of protected First Amendment type liberty. The resulting *in terrorem* or "chilling" effect on protected conduct is constitutionally impermissible. E.g., *Thomas* v. *Collins,* 323 U.S. 516, 530-32; *Shelton* v. *Tucker,* 364 U.S. 479, 488; *NAACP* v. *Button,* 371 U.S. 415, 432-33; *Griswold* v. *Connecticut,* 381 U.S. 479, 482-83. The sweep of the Kentucky court's construction of the Kentucky Disorderly Conduct statute chills the exercise of the rights of expression, assembly, petition for redress, and association.

KRS 437.016 reaches numerous forms of constitutionally protected conduct. Its provisions regulate and apply to various types of expression and assembly such as the making of noise and the public use of language and gestures. Thus, subsection (b) prohibits "unreasonable" noise. Subsection (c) prohibits abusive language or obscene language or gestures in a public place. Similarly, Section 437.016(f), the specific provision involved in Colten's conviction, reaches assembly in a public place. In light of the

[5] Note, *The Overbreadth Doctrine,* 83 Harv. L. Rev. 844, 853 (1970).

Kentucky court's interpretive gloss, and as shown by that court's application of the statute in this case, this last subsection of the Disorderly Conduct statute makes peaceful assembly in a public place unlawful if it aggravates, harasses, annoys or inconveniences a police officer absent a finding of predominant intent to exercise a constitutional right, or a finding that such right has sufficient social benefit to outweigh the inconvenience or annoyance caused to the police.

In the instant case, and as will be more fully explored in Point II of this brief, the defendant engaged in expression when he sought to advise a friend of a possible basis for non-issuance of a motor vehicle citation; he engaged in assembly and expression by observing the public act of issuing a citation; and he engaged in association in seeking peacefully to come to the aid of persons who seemed to need transportation back to their home locale. Although admitting that any inconvenience or annoyance generated by this conduct was "not great" (467 S.W.2d at 376), the Kentucky court held that such conduct was unlawful under this statute.

The degree to which the Kentucky court's construction of this Act reaches constitutionally protected conduct can be further illustrated by considering likely applications of that court's approach. For example, where paid union pickets walk in front of a struck plant on a bitter cold day, causing law enforcement officers to patrol the area against possible violence, subsection (f) of the Disorderly Conduct statute, as construed, might permit a police dispersal order and the arrest and conviction of any picketers who fail to disperse. The intent of the paid picket could reasonably be found to be other than the exercise of a

constitutional right—he pickets for economic gain. And the inconvenience and annoyance caused thereby to the police is obvious and considerable. Hence, under the enunciated Kentucky standard, a conviction might well follow. But such overly broad application would clearly reach constitutionally protected conduct. *Thornhill* v. *Alabama*, 310 U.S. 88; *Amalgamated Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308.

As a result of the Kentucky court's ruling in the instant case, when a person is ordered without good cause to "move" by a policeman, that person will risk conviction for disorderly conduct under subsection (f) of the Act if he fails to comply. Thus, the Act deters that person from exercising his constitutional right to question the police officer's order, and places each citizen at the whim and caprice of each policeman. See *Thompson* v. *Louisville*, 362 U.S. 199; *Wright* v. *Georgia*, 373 U.S. 284; *Brown* v. *Louisiana*, 383 U.S. 131; *Shuttlesworth* v. *Birmingham*, 382 U.S. 87.

Similarly, the person who publicly advocates or protests is deterred from using sharp, emotive words or colorful or base language because to do so in Kentucky is to risk a conviction under the Kentucky Disorderly Conduct statute for having used abusive or "obscene" language. Nevertheless, such expression is constitutionally protected. *Brandenburg* v. *Ohio*, 395 U.S. 444 (per curiam); *Cohen* v. *California*, 403 U.S. 15; *Street* v. *New York*, 394 U.S. 576; *Watts* v. *United States*, 394 U.S. 705; *Tinker* v. *Des Moines School District*, 393 U.S. 503; *Terminiello* v. *Chicago*, 337 U.S. 1; *Cantwell* v. *Connecticut*, 310 U.S. 296.

Thus, under the Kentucky court's holding, had Colten worn a jacket at the airport reading "Fuck the Nixon Pro-

gram," Officer Harlowe's concern for the annoyance and inconvenience to the "important people travelling in and out" of the airport would have been a ground for his arresting Colten under subsection (c) of the Act. Having found under the instant facts that Colten's predominant intent in remaining to see what transpired or to aid friends was to annoy and harass, and therefore not a "bona fide" exercise of constitutional rights, the Kentucky court would, in the hypothetical, undoubtedly reach the same result on the same reasoning. Yet such a decision would fly in the face of *Cohen* v. *California,* 403 U.S. 15 where Mr. Justice Harlan, speaking for the Court, stated:

> We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as to Keats' poems or Donne's sermons," [Citing authority] and why "so long as the means are peaceful, the communication need not meet standards of acceptability" [Citing authority]. 403 U.S. at 25.

In arguing the instant case before the Kentucky Court of Appeals, counsel offered a hypothetical to illustrate the excessive sweep of this statute. That hypothetical assumed the situation of a long-haired, bearded, barefooted speaker addressing a group of policemen and their wives stating: "You wonder why we call you pigs? I'll tell you why. Pigs are gluttonous and you people are so gluttonous that you have sold your souls to be the armed might of the establishment. We call you pigs because that's what you are." It was noted that such a situation would likely fall within the scope of subsections (c) and (g) of this Act as viewed on its

face. Now that we have the benefit of the Kentucky court's interpretive gloss, there is little doubt but that it would find the harassment and annoyance involved in such a situation to outweigh the exercise of constitutional right. Although not specifically ruling on that hypothetical, the Kentucky court provided clear guidance respecting its view of the illustrative situation when, rejecting Colten's unequal enforcement argument, the court remarked: "Colten complains of the fact that the arresting officer called him a 'loudmouth' when making the arrest, but we think this complaint comes with little grace from a man who argues in his brief the right of a citizen to call policemen *and their wives* 'pigs.' The evidence warrants the conclusion that Colten was in fact a 'loudmouth,' which fact tends to show an *absence* of discrimination in the enforcement of the statute against him, because 'loudmouths' are the class of persons who ordinarily would commit violations of the statute." 467 S.W.2d at 379. (Emphasis in original.) Yet, unless the circumstances in which such words were uttered clearly showed them to be fighting words, under the cases, the hypothetical conduct would be constitutionally protected. *Cohen* v. *California*, 403 U.S. 15; *Edwards* v. *South Carolina*, 372 U.S. 229; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Terminiello* v. *Chicago*, 337 U.S. 1.

The Kentucky court's test is so sweeping that guilt turns on the speaker's or assembler's thoughts or intent, not upon the impact of the alleged imminent substantial evil which will result from his conduct. The Kentucky court's decision in the instant case thereby sweeps freedom of thought and conscience into the scope of its prohibitions and for this reason, also, the Disorderly Conduct statute is constitutionally invalid under numerous prior decisions of this

Court. E.g., *DeJonge* v. *Oregon*, 299 U.S. 353; *Herndon* v. *Lowry*, 301 U.S. 242; *Street* v. *New York*, 394 U.S. 576; *Baird* v. *Arizona*, 401 U.S. 1, 6, 9.

Both the opinion of the Kentucky court, and its failure to attempt a confining interpretation, reveal that the sweeping constructive gloss placed upon the statute was an intentional choice resulting probably from the court's misconception of the constitutional imperatives. Other courts faced with similar statutes of apparent overbreadth have interpretively narrowed, rather than broadened, the statutory sweep. (For a contrasting decision see *Middlebrooks* v. *City of Birmingham*, 170 So.2d 424 (Ala. 1964).) Reversal in this case is required not only to eliminate this constitutionally void statute, but also to unequivocally apprise the Kentucky Court of Appeals, as well as other courts, of the proper doctrinal approach in construing and applying laws affecting First Amendment liberties.

II.

The facts in this case reveal that the Kentucky Disorderly Conduct statute has been rendered unconstitutionally broad and vague by application of the statute to convict the appellant (a) on the grounds that he failed to leave when ordered by the police to do so at the scene of the issuance of a motor vehicle citation to another person where the appellant either stated that he wished to observe what was happening or stated that he wished to aid affected persons to secure transportation home; or (b) on the grounds that the appellant's presence was judicially characterized as having caused others to congregate in a roadway.

The Kentucky court's decision makes it clear that whatever Colten was guilty of doing, he did not create any great inconvenience or annoyance. 467 S.W.2d at 376. This reason, alone, is enough to justify reversing the decision of the Kentucky court on the grounds that its application of the Disorderly Conduct statute has rendered it unconstitutional. *Edwards* v. *South Carolina*, 372 U.S. 229.[6] Nor, does the Kentucky decision make it clear as to just what Colten was guilty of doing or just what the nature was of any resulting inconvenience or annoyance.

The Kentucky court's decision states that Colten was not exercising his constitutional rights in good faith, and was

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[6] See also, *In re Little*, 40 U.S.L.W. 3349 (per curiam). Surely, if mere annoyance is insufficient grounds for penalizing those who affront the sensibilities of judges, there is no basis for imposing any greater protection for the sensibilities of policemen, the group seemingly annoyed by Colten.

pursuing an intention to harass and annoy the police. It supports this finding by suggesting that Colten could have accomplished his stated goal of assisting his friends by following a different course of conduct—promptly arranging for the passengers of Mendez's car to join him, and passing word to Mendez that someone would wait for him down the road. 467 S.W.2d at 376. (If, as Officer Miller testified, the patrol car windows were closed, the latter course would not have been possible.) The trial judge too had suggestions of how Colten could have handled the situation without getting into trouble. In his decision, the trial judge said that Colten should have gone back to his car and waited until the police were finished with Mendez. These suggestions are instructive because they reveal the extent to which a balancing test has been used in judging Colten. He did wrong, according to the Kentucky courts, because, if in his shoes, the judges would have acted otherwise.

Of course, neither set of suggestions would have placed Colten in compliance with the police orders. The police did not order him back to his car or even to hurry up and complete his business. They ordered him to leave. Officer Brown testified, for example, that he told Colten to get back in his car and "move on and clear the road" (App., p. 23). Trooper Harlowe testified that he told Colten to leave because Captain Mayes "had already made it clear that he was to be on his way" (App., p. 35). In any event, the mere fact that Colten did not act as some judges would have acted cannot be the basis for a constitutional conviction. *Cohen* v. *California,* 403 U.S. 15, 25.

Colten's presence in this public place was not a trespass, thereby distinguishing this case from the majority position in *Adderly* v. *Florida,* 385 U.S. 39 and the dissenting posi-

tion in *Brown* v. *Louisiana*, 383 U.S. 131, 151. The evidence did not show any restrictions upon public use of the shoulder area where Colten was arrested. Nor was the case prosecuted or decided on a basis of any restrictions upon the use of this public place.

Colten's conduct created no risk—substantial or otherwise, imminent or distant—of riot or disorder, thereby distinguishing this case from the majority position in *Feiner* v. *New York*, 340 U.S. 315 and the dissenting positions in *Edwards* v. *South Carolina*, 372 U.S. 229, 238 and *Terminiello* v. *Chicago*, 337 U.S. 1, 8, 13. Although the Kentucky Court of Appeals stated that Colten's presence encouraged and led others to stay, blocking a traffic lane (467 S.W.2d at 376), the evidence established that any blockage was the result of the choice of police to stop their vehicles in the traffic lane rather than pulling off onto the opposite shoulder (App., pp. 13, 16, 21, 24-25, 34, 35, 58, 59, 70-71, 151, 81-82, 90-91). More importantly, unlike the circumstances in *Feiner* (and like those in *Edwards*), there was ample police manpower on hand to control the situation and to remove any obstructions caused by the persons standing in the road. And, of course, the possibility of disorder by others is not a basis for refusing someone else his right to be present. *Wright* v. *Georgia*, 373 U.S. 284, 293; *Henry* v. *City of Rock Hill*, 376 U.S. 776 (per curiam).

Perhaps Colten's guilt lies in the Kentucky courts' finding that he failed to leave after several police requests to do so. But only in a police state is the bare failure to obey the order of a policeman grounds for punishment. As Mr. Justice White noted in his concurring opinion in *Terry* v. *Ohio*, 392 U.S. 1, 34: "There is nothing in the Constitution which prevents a policeman from addressing questions to

anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked *but may refuse to cooperate and go on his way.*" (Emphasis supplied.) See also *Wright* v. *Georgia*, 373 U.S. 284, 291-92. The use of public areas cannot be withheld at will by officials, such as policemen, "dispensing or withholding permission to speak, assemble, picket or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency' or 'morals' of the community." *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 153; *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614-615; *Gomez* v. *Wilson*, 323 F. Supp. 87 (D.D.C. 1971). Accordingly, Colten's guilt cannot turn on the mere fact that he did not leave when told to do so.

Attempting to detract from Colten's constitutional contention, the Kentucky Court of Appeals asserted that he was not exercising his freedom of speech because he was not expressing a thought or disseminating an idea. But freedom of expression and assembly are not limited to the realm of ideas and thoughts. Social and artistic expression, too, are protected. *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615; *Jacobellis* v. *Ohio*, 378 U.S. 184, 191 (Brennan, J. with Goldberg, J.); *Roth* v. *United States*, 354 U.S. 476, 498 (Harlan, J. concurring); *Winters* v. *New York*, 333 U.S. 507, 510. Moreover, the facts show that Colten was seeking to disseminate information both to Mendez and to Mendez's passengers. Further, Colten was engaged in another facet of free speech. He was observing the issuance of a motor vehicle citation; that is, he was exercising his constitutionally protected right to receive information. *Lamont* v. *Postmaster General*, 381 U.S. 301; *Stanley* v. *Georgia*, 394 U.S. 557, 564; *Martin* v. *City of*

Struthers, 319 U.S. 141, 143. Colten was, therefore, exercising constitutional rights when ordered to leave. Certainly in the absence of any showing of overwhelming public need justifying the restraint on his conduct, the application of the Disorderly Conduct statute to his situation was unconstitutional. *Edwards* v. *South Carolina,* 372 U.S. 229. Moreover, his conviction was unconstitutional because of a total absence of proof respecting any wrongful conduct. *Thompson* v. *Louisville,* 362 U.S. 199.

What were the real life dynamics of the transactions when Colten was arrested? What reason could have motivated the police to order Colten to leave? After all, the situation was well under control. The real reason probably is that the police as a rule order spectators to leave when they are issuing citations or arresting people. The "Move on" order is a typical police response. But why is this their reaction? Young people and black people, as well as others, will tell you that this is the reaction of the police because they do not want witnesses to acts of brutality. In the overwhelming majority of cases, that suspicion is undoubtedly wrong, but it is there. And because it is there, it is especially important that the right of peaceable assembly on such occasions not be infringed. That is the only way that we can allay the suspicions of those who doubt the fairness of our system and the equality with which law is administered.

One might ask a question similar to that asked by Mr. Justice White concurring in *Brown* v. *Louisiana,* 383 U.S. 131, 150-151. Had Colten been middle-aged, dressed in a business suit, and wearing closely cropped hair, would he have been ordered to move on? Would he have been grabbed by the arm, shoved toward the road, had his hair

pulled and his head beaten and been placed under arrest for disorderly conduct? A realistic appraisal of the situation strongly suggests that Colten was not arrested for disorderly conduct. Disorderly conduct entered the picture later as a *post hoc* justification for the arrest. He was arrested because some policemen, after a long tense day protecting the First Lady, were unable to resist the temptation first to order about this hippie-demonstrator type, then to grab him, and finally to rough him up. Having lost their professional composure, the police attempted to mask their error with a charge. See generally, P. Chevigny, *Police Power: Police Abuses in New York City* (1969). Because it is so sweeping and so vague, the Disorderly Conduct statute was a logical choice. By applying the Disorderly Conduct statute to Colten, therefore, the Kentucky Court of Appeals permitted its law to become the type of unconstitutionally sweeping and vague tool which this Court, as previously noted, warned against in *Coates* v. *City of Cincinnati*, 402 U.S. 611, 616: "[S]uch a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their life style or their physical appearance is resented by the majority of their fellow citizens." A statute so construed and applied cannot be the law in a free society.

III.

The due process clause of the Fourteenth Amendment is violated, the right to appeal is unconstitutionally fettered and chilled, and the defendant is unconstitutionally twice placed in jeopardy where, under a state's rules of criminal procedure, a conviction in a lower criminal court can be appealed only by a trial *de novo* in the court of general jurisdiction, and where upon conviction at such an appeal by trial *de novo* and without setting forth any special grounds of justification, the court of general jurisdiction fixes the penalty five times greater than that set by the lower criminal court.

A. *Kentucky Extracts a Price as a Condition of Exercising the Right to Appeal From the Errors of Inferior Courts.*

Kentucky gives a statutory right of appeal before the Circuit Court to persons convicted in the inferior criminal courts. (KRS 23.032.) By Rule that appeal is through a trial *de novo* even when the defendant is seeking to review errors of law only. Ky. R. Cr. 12.02, 12.06. The inferior criminal courts affected by this appellate system have jurisdiction over crimes punishable by up to $500 fine and up to 12 months' imprisonment. (KRS 25.010, 26.010.) At the trial *de novo* appeal from an inferior criminal court, the judge or jury may impose a harsher penalty than that which was fixed at the first trial, even though no explanation is provided or could be provided to justify that increase. 467 S.W.2d at 379. See R. Cr. 12.02, 12.06; see also, *Brooks* v. *Commonwealth,* 447 S.W.2d 614 (Ky. 1969) (holding that *North Carolina* v. *Pearce,* 395 U.S. 711, does not apply to remand retrials in which the jury sets the penalty).

In the instant case, the defendant was penalized by a fivefold increase in his fine for having exercised his sole avenue of appeal from the Quarterly Court—a *de novo* trial in the Circuit Court. The price extracted for exercising the right of appeal from the Quarterly Court judgment was far more severe in *Bell* v. *Commonwealth,* petition for certiorari pending, No. 70-5304, where the defendant was fined One ($1.00) Dollar plus costs in Quarterly Court but Five Hundred ($500.00) Dollars plus five (5) months and twenty-eight (28) days' imprisonment when he appealed to the Circuit Court. In both cases substantive constitutional issues were raised by the *de novo* appeal.

With admirable candor the Kentucky Court of Appeals stated, below: "Under our system of justice the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses." 467 S.W.2d at 379. This characterization of the inferior criminal courts is not unique. It has, for example, been observed that such courts tend to rubber stamp police action in disorderly conduct arrests. Model Penal Code, Tentative Draft No. 13 at 14 (1961); Meltzer & Trott, *Disorderly Conduct,* 4 Harv. Civ. Rights L. Rev. 311, 316 (1969).

Thus, under Kentucky law a defendant in any criminal action involving a potential fine of up to Five Hundred ($500.00) Dollars and a potential sentence of up to twelve (12) months' imprisonment, normally must run the gantlet of the lower court's penalty before his constitutional rights are safeguarded and, if the lower court has shown any

restraint in imposing the penalty, he must then risk a more severe penalty in order to secure those protections of justice which are available only in the court of general jurisdiction—the Circuit Court. The Kentucky Court of Appeals, seemingly trying to give reassurance respecting this burden of a potential increase in penalty as a condition of appeal from inferior court errors, notes: "An accused who wants a full-blown trial, in a court of general jurisdiction designed to give full protection to his rights, may appeal to the circuit court and obtain a trial de novo. If he so desires, he need not undergo the bother of a trial in the inferior court, for he can plead guilty there and still appeal to the circuit court." 467 S.W.2d at 379. That is, one seeking to safeguard his constitutional rights in Kentucky, need merely place himself *twice* in jeopardy.

B. North Carolina v. Pearce *Is Fully Applicable.*

The guiding authority respecting this issue is *North Carolina* v. *Pearce,* 395 U.S. 711. It held that where a retrial results from remand, a more severe penalty cannot be imposed than was fixed at the first trial absent a specific statement of reasons for that increase based on objective information respecting identifiable conduct on the part of the defendant, occurring after the original sentencing. The holding of *Pearce* is equally compelling here; there is no meaningful distinction between a retrial on remand and a trial *de novo* appeal. The controlling issue in this case is the same as that stated by the Court in *Pearce.* "When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" 395 U.S. at 713.

In both situations, retrial on remand and retrial on appeal, the second trial is a trial *de novo*. The only distinction is the authority for the new trial. In the *Pearce* type situation the authority for retrial is a decision resulting from an appellate court's review of the specific record; in the appeal by trial *de novo* situation the authority is a statute or a judge-made rule applicable to all cases. In the *Pearce* type situation the retrial order results from a specific finding of trial error in a particular case. In the trial *de novo* appeal, a legislative or judicial rule making determination has been made to the effect that it is reasonable and convenient to presume that because of procedural deficiencies in the inferior court, errors have occurred. In both situations the cure for the error is a new trial. Accordingly, the rule of *North Carolina* v. *Pearce* is equally applicable to trial *de novo* appeals.[7]

C. *Due Process Prohibits the Fettering of the Right to Appeal by the Threat of an Increased Penalty Upon Appeal.*

The holding in *Pearce* was explained by the Court as necessitated by due process in order to protect from judi-

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[7] *Wood* v. *Ross*, 434 F.2d 297 (4th Cir. 1970), *app. at sub nom.*, *North Carolina* v. *Rice*, 40 U.S.L.W. 4073 (U.S. December 14, 1971) (per curiam) (vacated and remanded on grounds of possible mootness); *Bronstein* v. *Superior Court*, 475 P.2d 235 (Ariz. 1970); *State* v. *Skah*, 466 P.2d 420 (Hawaii 1970); *Eldridge* v. *State*, 267 N.E.2d 48 (Ind. 1971); *Cherry* v. *State*, 264 A.2d 887 (Md. 1970); *State* v. *DeBonis*, 276 A.2d 137 (N.J. 1971); *Commonwealth* v. *Harper*, 280 A.2d 637 (Pa. 1971). Contra, *Walsh* v. *Picard*, 446 F.2d 1209 (1st Cir. 1971); *Lemieux* v. *Robbins*, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970); *Mann* v. *Commonwealth*, 271 N.E.2d 331 (Mass. 1971); *People* v. *Olary*, 170 N.W.2d 842 (Mich. 1969); *State* v. *Stanosheck*, 180 N.W.2d 226 (Neb. 1970); *State* v. *Sparrow*, 173 S.E.2d 897 (N.C. 1970); *State* v. *Spencer*, 173 S.E.2d 765 (N.C. 1970); *Evans* v. *City of Richmond*, 171 S.E.2d 247 (Va. 1969).

cial vindictiveness one who has dared exercise his right of appeal. It was also necessitated as a protection against the chilling effect which apprehension of such vindictiveness can have upon the defendant's propensity to exercise his statutory right of appeal. 395 U.S. at 725. And, the holding was further explained as necessitated on the grounds that once a statutory right of appeal has been granted "a court 'is without right to . . . put a price on an appeal. 'A defendant's exercise of a right of appeal must be free and unfettered.'" 395 U.S. at 724.

To permit a harsher punishment upon a trial *de novo* appeal is to force the defendant into a game of procedural Russian Roulette. Where, as in this case, that appeal will raise constitutional issues, such a deterrent is especially unfair and unwise. Cf. *Fay* v. *Noia*, 372 U.S. 391. The chilling effect of that gamble is enough to bring the *de novo* review within the holding of *Pearce*.

Moreover, circuit court trial judges can be as vindictive towards defendants who encumber their courts with trials for *de novo* review as they can be toward those who encumber the courts with retrials resulting from reversals or remand orders. Accordingly, if protection from such actual or feared vindictiveness is warranted in *Pearce*, it is equally warranted here. Whether in fact such abuse has occurred is not the critical question. As *Pearce* teaches us, the mere appearance of abuse itself violates the safeguards of due process. 395 U.S. at 725. Cf. *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145. In fact, there can be no question but that the opportunity to impose a greater penalty on *de novo* review deters the defendant who is considering appealing the inferior court's ruling on law or fact. That this is so

admitted by implication in the Kentucky court's opinion below. 467 S.W.2d at 379. See also, *Lemieux* v. *Robbins*, 414 F.2d 353, 355-56 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017. In *Pearce* the Court responded to these due process demands with a protective rule. The same rule is required here.

The Kentucky court's position characterizing the higher penalty as the "price" paid for the defendant's choice to go to Circuit Court (467 S.W.2d at 379) runs head-on against the clear pronouncement in *Pearce*: "It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." 395 U.S. at 723-24. The only difference between this pronounced prohibition and the policy apparently approved by the Kentucky court is that the Kentucky court prefers to characterize the heavier sentence as a "price" rather than label it as a punishment. But that very labelling of the harsher penalty as a "price" itself suggests to the lower courts that such payment is due in all cases. Therefore, the present Kentucky policy respecting increased penalties in *de novo* appeals should be rejected as violative of due process, and the *Pearce* rule made applicable, because the present Kentucky rule imposes a price on the right of appeal and chills the exercise of that right. *North Carolina* v. *Pearce*, 395 U.S. 711, 724.

It is significant, too, that the Kentucky Court of Appeals euphemistically speaks of the accused "electing" to be tried in Circuit Court, when in fact the only election of forum under Kentucky Criminal Procedure is in the hands of the arresting officer. Under Kentucky law, the Circuit Court

has jurisdiction over misdemeanors concurrent with the inferior courts—the Quarterly, Police, and Justice courts. KRS 25.010, 26.010. The choice of forum is made by the arresting officer's selection of the court to which he brings the defendant. Ky. R. Cr. 3.02, 3.04. Therefore, if the arresting officer selects a Circuit Court, the accused can appeal from trial error without being faced with the prospect of a more severe penalty; whereas if the arresting officer selects an inferior court, appeal from error is available only under threat of an increase in penalty. Thus, the unfairness of the trial *de novo* appeals process in Kentucky is compounded by the fact that control over the availability of an unburdened appeal rests in the uncontrolled and, therefore, arbitrary discretion of the arresting officer.

Some courts which have rejected application of *Pearce* to *de novo* appeals have argued that to limit the superior trial level court to the punishment below is to deprive the court of its independent judgment on the factors before it. See, e.g., *State* v. *Sparrow,* 173 S.E.2d 897, 903 (N.C. 1970). But this can be said as well of the second judgment in a pure *Pearce* type retrial. A trial court has no vested interest in imposing a particular penalty. Its judgmental authority is not "independent" but rather it is always confined by law.

It has also been argued that a restraint on the extent of punishment results in inequality between prosecutor and defendant in *de novo* appeals. See, e.g., *Lemieux* v. *Robbins,* 414 F.2d 353, 355 (1st Cir. 1969), *cert. denied,* 397 U.S. 1017. Here again, however, the same is true in the pure *Pearce* situation. Further, constitutional due process standards such as the protection from being twice placed

in jeopardy reject the idea that in our system of criminal justice a prosecutor should somehow have parallel procedural opportunities with those afforded the defendant.

The First Circuit in *Lemieux* conceded that the possibility of a greater penalty on a *de novo* appeal does have a chilling effect on the exercise of the right to appeal. 414 F.2d at 355-56. But, that court ruled, the chilling effect must be tolerated because it serves "legitimate state objectives." Just how those state objectives differ from those rejected by the Supreme Court in *Pearce*, the First Circuit does not explain. The First Circuit does suggest that if *Pearce* applies to trial *de novo* review, then inferior courts might tend to give maximum sentences out of caution. 414 F.2d at 356. But this postulate is unreasonable. As the First Circuit itself notes, such a practice would simply encourage almost automatic exercise of the *de novo* appeal and the very recognition of this probability would be enough to deter the inferior courts from engaging in such a self-defeating practice.

The alternative evil which the First Circuit envisions is the shifting of all cases to the superior trial courts if the inferior courts persist in giving small penalties. This argument, too, is wholly without merit. It assumes, first that prosecutors or the state conceive of justice as being served only by the imposition of maximum sentences. If that were true, legislatures would not make provision for variable penalties and conscientious prosecutors would neither engage in plea bargaining nor even recommend lesser penalties to judges or juries. But law can be maintained as the source of social and economic order without securing maximum penalties in all or even a substantial portion of cases. Moreover, if the state finds the inferior

courts to be inadequate in their performance, it is the state that will correct that malfunction in the administration of justice. The courts should not speculate, to the disadvantage of criminal defendants, on what the state will deem to be inadequate performance.

Finally, it has been contended that application of *Pearce* to trial *de novo* appeals will unduly burden the trial courts of general jurisdiction. This argument in itself is an admission that the prospect of a higher penalty upon trial *de novo* conviction deters exercise of the right of appeal. Beyond this, however, experience does not support the fear of the added burden to the courts of general jurisdiction. For example, in declining to join in the brief of the State of North Carolina in *North Carolina* v. *Rice,* 40 U.S.L.W. 4073 (U.S. 1971), the Attorney General of Minnesota stated that experience with the *Pearce* policy in trial *de novo* appeals in that state had not resulted in an undue burden on the superior trial courts. See Brief of Respondent in *Rice,* No. 70-1325 at 20-21. Since 1968, New Mexico has operated its trial *de novo* appeal system under a statute prohibiting increased penalties apparently without suffering a resulting flood of appeals. Indeed, the majority of states do not utilize trial *de novo* appeals at all. Moreover, expediency has never justified denying due process.

D. *The Kentucky Court of Appeals Has Placed an Unconstitutional Price on the Right to Have a Fair Trial.*

The Kentucky Court of Appeals readily admits that it is placing a price on the appeal from the lower court's judgment. 467 S.W.2d at 379. Its explanation is that its trial *de novo* system merely provides the accused with an

election to appear before a court of general jurisdiction "rather than a court of convenience." *Ibid.* The price, it asserts, is placed on the "privilege of a choice of courts as distinguished from pricing the right to obtain a fair trial in one court which the state fixes as the sole forum." *Ibid.* But, the sole forum in which the accused's freedom is first placed in jeopardy in misdemeanor cases in Kentucky is normally the inferior court. By the Kentucky court's own admission, that is not a court in which the accused can be expected to obtain a fair trial. *Ibid.* Accordingly, the price affixed for appeal—being twice placed in jeopardy, being placed in fear of suffering a more severe penalty—is indeed placed on the right to obtain a fair trial and, therefore, is directly contrary to the most basic concept of procedural fairness. It is also the price of perfecting any appeal from constitutional trial error to any reviewing court, up to and including this Court.

E. *Increasing the Penalty on a Trial* De Novo *Appeal Violates the Prohibition Against Double Jeopardy.*

In *North Carolina* v. *Pearce;* 395 U.S. 711, the Court rejected the assertion that the 14th Amendment due process protection from double jeopardy protects against increased penalty at the retrial. The Court relied on a line of cases, commencing with *United States* v. *Ball,* 163 U.S. 662 and *Stroud* v. *United States,* 251 U.S. 15, in which the Court had previously rejected the double jeopardy protection as a barrier either to retrial of a defendant whose conviction was set aside due to error, or to imposition of a greater penalty on the second trial. 395 U.S. at 720-21. Justices Douglas, Harlan and Marshall would have found the double jeopardy protection violated in *Pearce.* 395 U.S. at 727, 745. Even if double jeopardy was not a proper barrier to

an increased penalty in *Pearce,* it is such a barrier here. In the instant case, the second trial is an exposure to jeopardy forced upon the defendant as the price for securing a constitutional hearing.

As previously noted, the Kentucky Court of Appeals has admitted that the hearings in its lower criminal courts do not meet constitutional standards. We can assume that that fact constitutes a major reason for adopting the rule providing for the automatic granting of a *de novo* trial. Under the Kentucky procedure, a defendant brought into an inferior criminal court must first run the gantlet of arrest, possible imprisonment, securing of bail, securing of counsel, preparation for defense or plea in the inferior court, appearance for trial before that court, and imposition of sentence. If the defendant is convicted but wishes to secure the benefits of a constitutional trial, he runs a second gantlet consisting of posting a supersedeas bond,[8] securing counsel, preparing for trial and appearing for trial before the court of general jurisdiction. A defendant who cannot secure bail or recognition is incarcerated while awaiting the retrial. Thus, contrary to the holding of *Green* v. *United States,* 355 U.S. 184, 190, the defendant is forced to run the gantlet twice. Unlike Pearce who chose a second trial to relieve himself from the burden of error at the first trial, the defendant in the *de novo* proceeding chooses the second trial as his first opportunity to receive due process of law irrespective of specific errors in the

[8] Ky. R. Cr. 12.02(1) requires posting a bond assuring payment of the costs of appeal and performance of the potential judgment on retrial. This is separate from the bail bond. In the instant case that appeal bond was set at $933.50 consisting of $500 for the potential fine, $360 for the potential six months' imprisonment, and $73.50 for court costs.

first trial. The defendant appealing for a *de novo* trial in Kentucky receives but one constitutionally cognizable trial under the decision below, yet he is twice subject to the burdens of making his defense and twice subject to punishment. To allow that punishment to be enhanced at the second trial is to penalize the defendant for the state's failure to provide an initial constitutional trial. But, the concept of the double jeopardy safeguard encompasses protecting a defendant from the state receiving two bites at the apple. *Downum* v. *United States,* 372 U.S. 734, 736; *Green* v. *United States,* 355 U.S. 184, 190; *Benton* v. *Maryland,* 395 U.S. 784, 796-97. Hence the double jeopardy clause bars increased penalties upon *de novo* appeals.

Moreover, the line of reasoning pursued by Mr. Justice Harlan in *Pearce* is fully applicable in the present situation respecting double jeopardy. In his separate opinion in *Pearce,* Mr. Justice Harlan noted that the double jeopardy rule was recognized in *Green* v. *United States,* 355 U.S. 184, to bar retrying a defendant on remand for a greater offense than the highest offense for which he was convicted at the first trial. Applying the reasoning of *Green,* Mr. Justice Harlan pointed out that the merits for protecting against jeopardy for a harsher offense on retrial are equally applicable respecting the imposition of a harsher penalty on retrial. 395 U.S. at 746. Further, as Mr. Justice Harlan stated: "It cannot be that the [double jeopardy] provision does not comprehend 'sentences'—as distinguished from 'offenses'—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one." 395 U.S. at 747.

CONCLUSION

The judgment of the Kentucky Court of Appeals should be reversed and the case should be remanded for dismissal, on the grounds that the Disorderly Conduct statute as construed and as applied violates the Fourteenth Amendment. If this Court does not find the Disorderly Conduct statute unconstitutional, the judgment of the Kentucky court still should be vacated and the case remanded for a modification of the penalty in accordance with the rule of *North Carolina* v. *Pearce*, 395 U.S. 711.

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